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No. 78-42

In the Supreme Court of the United States

OCTOBER TERM, 1978

DENNIS ROY CHOATE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion and order of this district court (Pet. App. C 1-33) is reported at 422 F. Supp. 261. The opinion of the court of appeals (Pet. App. A 1-59) is reported at 576 F. 2d 165.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1978 (Pet. App. A 1), and a petition for rehearing was denied on June 6, 1978 (Pet. App. B 1). The petition for a writ of certiorari was filed on July 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the warrantless inspection and recording of information on the outside of an envelope sent through the mails, pursuant to a mail cover conducted by the Postal Service at the request of the Federal Bureau of Customs, violates the Fourth Amendment.

STATEMENT

In April 1972, the Federal Bureau of Customs resumed a previously closed investigation into petitioner's alleged involvement in illegal narcotics activities. On the basis of information received from Carl Thompson, an informant, Customs Agent Lynn Williams sought to determine whether there was a relationship between petitioner's assets and his alleged narcotics activities. As part of the investigation, Williams wrote to the Postal Inspector of Los Angeles, California, on July 19, 1972, requesting a mail cover[1] of petitioner's first and fourth class mail for 30 days. Williams' letter advised the Postal Inspector that petitioner was currently under investigation for narcotics smuggling, that he believed that petitioner was organizing a smuggling ring with a primary source located in South America, and that "[i]t [was] felt that" petitioner corresponded by mail with the South American source (Pet. App. A 6). The Postal Inspector approved the mail cover (*id.* at 16-20).

As a result of the mail cover, Williams discovered the identity of various financial institutions with which petitioner dealt. The Customs Service provided the names

[1]Under a "mail cover," a record is made of any data (*e.g.*, post marks, sender's return address) appearing on the outside cover of first class mail and contents of other classes of mail. See 39 C.F.R. 233.2(c)(1). The question in this case involves only data obtained from the exterior of petitioner's first class mail.

of these institutions to the Internal Revenue Service, which in turn commenced a tax investigation of petitioner, and obtained information from the financial institutions identified by the mail cover. Petitioner was subsequently indicted for tax evasion under 26 U.S.C. 7201 (Pet. App. A 2).

Prior to trial, petitioner moved to suppress all of the government's evidence. At the ensuing hearing on petitioner's motion to suppress, the existence of the mail cover was disclosed. The district court granted petitioner's motion to suppress, holding that a mail cover is a search and seizure within the meaning of the Fourth Amendment and that the mail cover here was an unreasonable search and seizure because it was instituted without a warrant. The district court also found that the letter requesting the mail cover did not comply with the provisions of the postal regulations, which require that the letter requesting the mail cover "stipulate and specif[y] the reasonable grounds that exist" that will aid in locating a fugitive or in obtaining information of the commission of a crime. See 39 C.F.R. 233.2(e)(1)(ii) (Pet. App. C 6-18).

The court of appeals reversed, with one judge dissenting (Pet. App. A 1-59). The court held that the mail cover did not violate the Fourth Amendment (Pet. App. A 26-49). As the court stated, a correspondent has no reasonable expectation of privacy with respect to information derived from the outside of mail addressed to him (Pet. App. A 29). The court further held that the letter requesting the mail cover fully complied with the requirements of postal regulations (Pet. App. A 16-23).

ARGUMENT

1. The court of appeals correctly held that a warrantless mail cover, pursuant to which information on the outside of envelopes is inspected, does not violate the

Fourth Amendment. As the decision below observed (Pet. App. A 29-30), the courts of appeals that have considered the constitutionality of mail covers have uniformly held that they do not violate the Fourth Amendment's prohibition against unreasonable searches and seizures. *United States* v. *Costello*, 255 F. 2d 876 (2d Cir. 1958); *United States* v. *Leonard*, 524 F. 2d 1076 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976); *United States* v. *Bianco*, 534 F. 2d 501 (2d Cir.1976); *United States* v. *Balistrieri*, 403 F. 2d 472 (7th Cir. 1968); *Canaday* v. *United States*, 354 F. 2d 849 (8th Cir. 1966); *Lustiger* v. *United States*, 386 F. 2d 132 (9 Cir. 1967), cert. denied, 390 U.S. 951 (1968). See also *United States* v. *Schwartz*, 283 F. 2d 107 (3d Cir. 1960), cert. denied, 364 U.S. 942 (1961).

Petitioner nevertheless contends (Pet. 16-19) that these decisions conflict with the principles underlying *Katz* v. *United States*, 389 U.S. 347 (1967), and *United States* v. *New York Telephone Co.*, 434 U.S. 159 (1977). There is, however, no such conflict. In *Katz*, this Court held that the warrantless use of an electronic listening device affixed to the exterior of a public telephone booth in order to hear the telephone user's conversation violated the Fourth Amendment. In so holding, the Court noted that a person using a telephone booth "is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world" (389 U.S. at 352). But the Court recognized that (*id.* at 351) "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."

Here, as the court of appeals noted (Pet. App. A 29), "there is no reasonable expectation that * * * [the information on the exterior of an envelope would] remain unobserved." Although the Fourth Amendment prohibits the warrantless opening of sealed letters and packages (*Ex*

parte Jackson, 96 U.S. 727 (1877); *United States* v. *Chadwick*, 433 U.S. 1, 10-11 (1977)), there was no such opening here. All that was done was to record information from the outside of certain envelopes. See also *United States* v. *Miller*, 425 U.S. 435, 442 (1976).

Thus, this case is far closer to *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970), where the Court held that the warrantless inspection of the exterior, and subsequent 29-hour detention, of first class mail did not violate the Fourth Amendment. As the Court stated, "[n]o interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day when they were deposited [with the post office]. The significant Fourth Amendment interest was in the privacy of this first-class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained" (*id.* at 253). In placing his return address on an envelope, the sender "knowingly exposes [his identity] to the public" so that such information "is not a subject of Fourth Amendment protection" (389 U.S. at 351). Indeed, the very purpose of a sender in placing his return address on an envelope is to advise the Postal Service where to return the mail if it cannot be delivered to the addressee. There is accordingly no legitimate privacy interest in such information that would be protected by the Fourth Amendment.

United States v. *New York Telephone Co.*, *supra*, upon which petitioner (Pet. 25-27) and the dissenting opinion below (Pet. App. A 73) rely, is not to the contrary. There, the Court held that under the All-Writs Act (28 U.S.C. 1651) a federal district court could direct a telephone company to provide law enforcement officers with the facilities and technical assistance necessary for the implementation of its order authorizing the use of pen registers (which only record telephone numbers called) to

investigate offenses which there was probable cause to believe were being committed by means of the telephone. In obtaining the judicial authorization for the use of the pen registers, the agents' affidavit established probable cause. It was therefore unnecessary for the Court to consider whether pen register surveillance was subject to the requirements of the Fourth Amendment (434 U.S. at 165 n. 7).[2] Petitioner therefore errs in asserting that mail covers are analogous to pen registers and that *New York Telephone Co.* stands for the proposition that mail covers are subject to the warrant requirement. That case only addressed the authority of the district court to order the telephone company to assist in the installation of a pen register.[3]

2. Finally, petitioner contends (Pet. 31-35) that Agent Williams "intentionally falsified" the material representations contained in his mail cover request (Pet. App. D) to the postal service so that the mail cover failed to comply with the postal regulations. Specifically, petitioner

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[2]As we have previously pointed out (Brief for the United States, *United States* v. *Giordano, et al.*, No. 72-1057, p. 72 n.4; see also *United States* v. *Giordano*, 416 U.S. 505, 554 n. 4 (1974) (Powell, J., concurring and dissenting)), it is unclear whether the use of a pen register is subject to the requirements of the Fourth Amendment. See *Hodge* v. *Mountain States Tel. & Tel. Co.*, 555 F. 2d 254, 256 (9th Cir. 1977).

[3]Here, there is no question as to the authority for the implementation of the mail cover. The postal regulations (39 C.F.R. 233.2(e)(1)) specifically provide that upon request, the Postal Service will conduct a mail cover for certain law enforcement agencies where the information may prove helpful in conducting an investigation. The court of appeals rejected petitioner's contention that Agent Williams' request did not comply with the regulations (Pet. App. A 16-23) and petitioner does not renew that claim here. Rather, he has narrowed his argument to attack the factual basis for the request (see page 7, *infra*).

asserts that Williams had no "current" information that he was organizing a narcotics smuggling ring; that the statement in the request that petitioner and his alleged South America source corresponded by mail was pure speculation; and that the statement in the request that the mail cover would aid in identifying the South American source was false because Williams had focused his investigation upon petitioner's assets.

But as the court of appeals observed (Pet. App. A 22), the narcotics investigation was reopened prior to the mail cover request and was continuing even at the time of the hearings in the district court. Thus, Agent Williams' request cannot be characterized as false. Moreover, it was entirely reasonable for Williams to conclude that petitioner corresponded with his South American source and that the mail cover would identify that source. Williams' inquiry into petitioner's assets is not inconsistent with that latter representation. Since "[petitioner] and the district judge did not question Williams' veracity," the court of appeals properly concluded that "it [was] inappropriate for us as reviewing judges to impugn his truthfulness on the basis of a cold record that can be read consistently with the contents of the letter" (*ibid.*).[4]

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[4]Petitioner also argues (Pet. 35-39) that the use of mail covers unreasonably abridges First Amendment rights. But the communications in the envelope are not disturbed by a mail cover. Moreover, if the initiator of the communication (*i.e.*, the sender) does not voluntarily disclose his identity on the envelope, which he is free to do, a mail cover would not even identify him. Thus, it is clear that a mail cover does not inhibit freedom of communication.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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